Discretion: The Better Part of Valor in the War on Drugs

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In 1982, President Ronald Reagan declared the "War on Drugs." In response to this declaration, Congress insisted on the creation of the Federal Sentencing Guidelines ("Guidelines"). The Guidelines were intended to promote stricter sentencing, and eliminate disparity in sentencing. Many hoped stringent guide-

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1 See President's Radio Address to Nation on Federal Drug Policy, 18 WEEKLY COMP. PRES. DOC. 1249, 1250 (Oct. 2, 1982). In his address President Ronald Reagan stated: "The mood toward drugs is changing in this country, and the momentum is with us. . . . Drugs are bad and we're going after them. . . . [W]e've taken down the surrender flag and run up the battle flag. And we're going to win the war on drugs." Id.; see also Diane-Michele Krasnow, To Stop the Scourge: The Supreme Court's Approach to the War on Drugs, 19 Am. J. CRIM. L. 219, 221 (1992); Whitman Knapp, One Vietnam Was Enough, NEWSDAY, Apr. 30, 1993, at 60. The President's speech created a shift in public opinion not only against the drug trafficker, but also the casual user. Id.


3 See H.R. REP. No. 3315, 103d Cong., 1st Sess., pt. 1, at § 2(1) (1994). Congressional findings indicate that the current national crime and drug strategy has failed, and longer prison sentences have not reduced crime. Id.; Eric P. Berlin, The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest, 1993 WIS. L. REV. 187, 196. The author noted: The Guidelines' limitations on judicial sentencing discretion . . . have had several undesired effects. These changes have resulted in continued disparity in sentencing, an increased burden on the taxpayers for the costs of imprisoning so many offenders, and a loss of integrity for the judiciary and the criminal justice system. By failing to elimi-
lines would counter the drug problem. However, the general consensus is that the Guidelines have not eliminated this problem. Today, drug offenders constitute sixty percent of the federal prison population, as compared to twenty-five percent in 1980. As a consequence of the Guidelines, federal and state prison populations have exploded and drug use has steadily increased. Although the Guidelines have generated more arrests, many problems have arisen. The use of the Guidelines has not deterred drug use; there is continued sentencing disparity; there are problems of judicial sentencing discretion; and there are constitutional abuses. These problems are a clear indication that the Guidelines are not achieving their desired results, thus leading critics to argue that this is not the proper weapon.

\[\text{Id.}\]

4 See supra note 1 and accompanying text (discussing purpose for creation of Guidelines). See generally Phyllis J. Newton, et al., Decade of Sentencing Guidelines: Revisiting the Role of the Legislature, 28 WAKE FOREST L. REV. 305, 305 (1993). In response to the drug problem, Congress enacted the Sentencing Reform Act which was the furthest reaching reform of federal sentencing in the country's history. Id.

5 See Knapp, supra note 1, at 60. The author has expressed the opinion that "[t]he nation's accomplishments in Vietnam were a brilliant success compared with its accomplishments in the "War on Drugs."" Id.; see also H.R. REP. No. 3315, 103d Cong., 1st Sess., pt. 1, at § 2(1) (1994). Congress declared in its findings that the current national crime and drug strategy has failed. Id.

6 See Myriam Marquez, Mandatory Drug Sentences Make for Full Prisons, Empty Victory, ORLANDO SENTINEL TRIB., June 2, 1993, at A10 (48,000 of 84,000 federal prisoners incarcerated for drug offenses).

7 See id. This explosion has been criticized, because small time dealers and users are occupying limited prison space which could be used for more violent and dangerous criminals who are being released. Id.

8 See The State of Criminal Justice: An Annual Report, 1993 ABA SEC. CRIM. JUST. 7 [hereinafter Criminal Justice Report]. Between 1986 and 1991, the proportion of the prison population made up of drug offenders increased from nine percent to twenty-two percent. Id. Meanwhile, the proportion for violent offenders actually decreased by ten percent; and the proportion for serious property offenders decreased by six percent. Id. These percentages reflect a trend towards pre-occupation with non-violent drug offenders leading to severe prison overcrowding and the release of violent criminals. Id.

9 See Stanley Meisler, Nothing Works, L.A. TIMES, May 7, 1989, (Magazine), at 20, 24 (indicating that increased law enforcement effort has not hurt drug trade because drug prices have declined in 1980s); see also Daniel J. Winters, Note, Encouraging Defendant's to Overcome Their Drug Addictions in the Period Between Arrest and Sentencing: A Proposed Amendment to the Federal Sentencing Guidelines, 1991 U. ILL. L. REV. 1199, 1200 (stating dramatic increase in number of arrests indicates successful government policy, with minor impact on drug use); Michael Tackett, Minor Drug Player's are Paying Big Prices, Chi. TRIB., Oct. 15, 1990, at 1, 6 (22.8 percent of defendant's convicted of drug offenses prior to Guidelines, while 48.3 percent convicted for drug-related crimes since enactment of Guidelines).

While the Guidelines reflect a new perspective towards the "War on Drugs," they remain consistent with the Nation's earlier approaches to criminal justice. Historically, the United States emphasized capital punishment as a means of deterrence. This emphasis shifted in the 1800s towards longer prison sentences and the philosophy of rehabilitation, which remained in "vogue" until the mid-1970s. In the late 1970s, rehabilitation was denounced as ineffective because it created a "revolving door," whereby offenders were deemed reformed and released only to commit new crimes. At the same time, the criminal justice system created disproportionate sentencing for similar crimes, leaving many to question the system's fairness and certainty. As a result, Congress enacted the Sentencing Reform Act ("SRA") in 1987 as a means of eliminating disparity and imposing harsher penalties for drug offenders. The SRA created the Federal Sentencing Commission (the "Commission") which was authorized to

its enactment federal prisons are overcrowded by fifty-six percent. Id.; see also Alan B. Fischler, Enough is Enough of the War on Drugs, N.Y. L.J., Apr. 14, 1993, at 2 (enhanced enforcement efforts and tougher drug penalties have increased drug use and violence); Michael Tackett, Drug War Chokes Federal Courts: Assembly-Line Justice Perils Legal System, Chi. Trm., Oct. 14, 1990, at C1, C5 (United States District Judge Lawrence Irving explaining that stiffer sentences do not deter drug related crimes since "there is always somebody to fill their shoes").

See Newton, supra note 4, at 305 (discussing history of sentencing reform).

See Ogletree, supra note 10, at 1940. "[M]any early examples of sentencing law focused on retribution and restitution for the victim" on the theory that the punishment should fit the crime. Id.; Exodus 21:24-25 (New American). This book from the Bible stated: "[E]ye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe." Id.; see also David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 52-53, 61-62 (1971) (arguing criminal offenders were not being sanctioned appropriately); Newton, supra note 4, at 305 (discussing history of sentencing reform).


See Newton, supra note 4, at 305 (arguing rehabilitative system also created unwanted sentencing disparity).

See supra note 4 (discussing need for mandatory sentences).

promulgate sentencing guidelines for courts to use when imposing sentences. The guideline manual, created by the Commission, established ranges for sentencing that courts must follow.

This Note examines the problems created by the Federal Sentencing Guidelines as a weapon in the "War on Drugs." Part One examines the constitutional issues inherent in the use of the Guidelines. Part Two focuses on the effect of limiting judicial discretion in the sentencing procedure. Part Three illustrates the Guidelines' failure to eliminate sentencing disparity. Finally, Part Four suggests alternative solutions and legislative reform.

I. THE CONSTITUTIONALITY OF THE FEDERAL SENTENCING GUIDELINES

Since its enactment, questions regarding the constitutionality of the Guidelines have caused considerable controversy. United States v. Whyte indicated that over one hundred courts ruled inconsistently on the constitutionality of the Guidelines. The Supreme Court has repelled constitutional attacks pursuant to Mistretta v. United States, by upholding the Sentencing Guidelines. The Guidelines have been attacked primarily on the issues of delegation and separation of powers. Recently, Due Process


23 Id. at 1194 n.1.


25 Id. at 412.

26 See U.S. Const. art. I, § 1. Section One provides in pertinent part: "[all legislative powers herein granted shall be vested in a Congress of the United States. . ." Id. The Supreme Court has long interpreted this clause to mandate that Congress cannot generally delegate its legislative power to another branch. See Field v. Clark, 143 U.S. 649, 692 (1891). See generally U.S. Const. art. II, § 1 (executive branch has authority to execute all laws); U.S. Const. art. III, § 1 (establishing judicial branch with power to interpret laws).
and the Eighth Amendment have also come to the forefront in challenging the Guidelines.\(^{27}\)

A. The Delegation Issue

Article I of the Constitution prohibits Congress from delegating its legislative powers to any other branch.\(^{28}\) Originally, some courts declared the Guidelines void because Congress assigned the legislative function of the SRA to an independent commission.\(^{29}\) This issue reached the Supreme Court in *Mistretta v. United States*,\(^{30}\) in which the Court held that the SRA did not violate the non-delegation doctrine.\(^{31}\) The Court incorporated the test set forth in *J.W. Hampton Jr. & Co. v. United States*,\(^{32}\) which ruled that delegation was constitutional if Congress clearly established the general policy, and the public agency which was to apply the policy.\(^{33}\) *Mistretta* followed the test developed in *Yakus v. United States*,\(^{34}\) that Congress must provide a proceeding to deter-


\(^{28}\) See U.S. Const. art. I, § 1. This section provides: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *Id.*


\(^{31}\) *Id.* at 371-79.

\(^{32}\) 276 U.S. 394 (1927).

\(^{33}\) *Id.* at 409. The Court held: "[i]f Congress . . . lays down by legislative act an intelligible principle to which the persons or body authorized to act is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* Chief Justice Taft explained that "[i]n determining what [Congress] may do in seeking assistance from another branch the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination." *Id.* at 406; see also *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) ("constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.").

\(^{34}\) 321 U.S. 414 (1944).
mine whether its policies were being complied with. Based on the Supreme Court's rationale, the SRA falls within Congress's power under Article I to make all laws necessary and proper to carry out any power enumerated in the Constitution. In today's ever-changing society, Congress cannot do its job without delegating power.

In forming the Guidelines, Congress specified a matrix which matched a given sentencing range to a defendant's "offense level." The "offense level" is calculated by determining the "base level" of a particular offense. This level is adjusted upwards or downwards in the sentencing range based on the characteristics provided in the Guidelines. By creating this matrix for the commission to apply, Congress has employed the test established in *J.W Hampton Jr. & Co.*, by instituting a general policy which the Commission is to follow.

**B. The Separation of Powers Issue**

At the core of the constitutional attacks on the Guidelines is the issue of the separation of powers. Separation of Powers is a system of checks and balances which regulates the power of the executive, legislative, and judicial branches of the federal govern-

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35 *Id.* at 426. Congress must provide, in the "absence of standards . . . a proper proceeding to ascertain whether the Congress had been obeyed." *Id.*

36 U.S. CONSTR. art. I, § 8, cl. 18. This clause provides in relevant part: Congress shall have power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution . . ." *Id.*

37 See *Opp Cotton Mills, Inc. v. Division of Labor*, 312 U.S. 126, 145 (1941). "[I]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy." *Id.*; *Cospito v. Heckler*, 742 F.2d 72, 86 (3d Cir. 1984). The court held that congressional delegation to an administrative agency was valid if accompanied by articulation of congressional policy. *Id.*; *Haviland v. Butz*, 543 F.2d 169, 174 (D.C. Cir. 1976). The *Haviland* court explained that delegation of powers was necessary to enable Congress to exert legislative powers effectively. *Id.*; see also *United States v. Robel*, 389 U.S. 258, 274 (1967) (Brennan, J., concurring). "Delegation of power under general directives is an inevitable consequence of our complex society, with its myriad, ever changing, highly technical problems." *Id.*; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "[T]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its function." *Id.*


41 See *supra* note 33 and accompanying text (discussing policy in *J.W. Hampton*).

42 See *Black*, supra note 21, at 775. "[A]ll of the sentencing cases raise separation of powers concerns." *Id.*
The SRA provides that three of the seven voting members on the commission are required to be judges. Courts have criticized the constitutionality of the Guidelines, because they place a judge on an independent commission inside the judiciary whereby he or she cannot exercise power under Article III. Since judges abandon their Article III powers to act as legislators, it is argued that Congress unconstitutionally interfered in the judiciary’s power to resolve cases and controversies, while also vesting legislative authority in judges. This issue was explored extensively in Mistretta.

The Supreme Court ruled in Mistretta that Congress did not violate the separation of powers principles in their scheme to resolve excessive disparity in criminal sentencing. The petitioner in Mistretta was a cocaine dealer who challenged the Guidelines constitutionality on the grounds that a sentencing commission violated Separation of Powers. The Court based its decision on four grounds. First, the Court determined that the location of the

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43 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952). The Constitution diffuses power by “enjoin[ing] upon its branches separateness but interdependence, autonomy but reciprocity.” Id.
44 See 28 U.S.C. § 991(a) (1993) (establishing independent commission consisting of seven voting members and one nonvoting member). See generally Black, supra note 21, at 779. The President must choose judges from a list supplied by the Judicial Conference of the United States. Id.
45 See infra notes 46-60 and accompanying text (arguing Guidelines eliminate judiciary’s Article Three powers).
46 See U.S. Const. art. III, § 2 (vesting judiciary with power to resolve all cases and controversies); see also 28 U.S.C. § 991(a) (1993) (establishing Sentencing Commission within judicial branch).
47 See Black, supra note 21, at 779-80 (discussing objection to granting executive and legislative power to judicial branch).
48 See U.S. Const. art. III, § 2. The article provides in relevant part: The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . to all controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States.
49 Id.; see also 28 U.S.C. § 991(a) (1993). The President is allowed to appoint three federal judges referred to him by the Judicial Conference of the United States. Id. The judges may serve on the Commission, in addition to serving on the bench. Id. Furthermore, the President may remove the judges, but removal does not affect the judge’s position on the bench. Id.
51 See id. at 412 (holding Constitution does not prohibit delegating to judicial branch task of formulating guidelines so long as statutory direction provided).
52 Id. at 361. Mistretta pleaded guilty to one count of conspiracy to distribute, and was sentenced to eighteen months under the Guidelines. Id.
53 See infra notes 54-58 and accompanying text (discussing rationale for upholding constitutionality of Guidelines).
commission within the judicial branch was permissible, because the commission’s nonadjudicatory functions did not invade the prerogatives of another branch.\textsuperscript{54} Second, the Court reasoned that Congress could delegate nonadjudicatory functions to the judicial branch, provided Congress did not violate the prerogatives of any other branch.\textsuperscript{55} It was held that the courts’ extra-judicial activity in promulgating sentences was within the integrity of their branch.\textsuperscript{56} Third, the Court found that judicial service on the commission did not impair the primary function of the judiciary in adjudicating cases, provided it assumed a purely administrative role.\textsuperscript{57} Fourth, the Court determined that the presidential power to remove and appoint members to the committee did not prevent the judicial branch from performing its constitutional duties.\textsuperscript{58}

Initially, it appeared that the Court properly upheld the Guidelines because the system of checks and balances did not prohibit Congress from calling upon the experience and knowledge of the judicial branch in creating policies uniquely within the purview of judges.\textsuperscript{59} However, this is problematic when judges depart from the Guidelines and the sentence is appealed. Placing judges on the Sentencing Commission threatens impartiality, because judges are predisposed to rule in favor of policies their fellow judges aided in promulgating.\textsuperscript{60} Thus, a paradox is created, whereby a judge on appellate review must decide whether to uphold the judicially created sentence or to affirm a colleague’s discretionary departure.

C. The Due Process Issue

Currently, the constitutional debate surrounding the SRA is derived from Due Process attacks which were not addressed in \textit{Mistretta}, 488 U.S. at 383-89.\textsuperscript{54} Mistretta v. United States, 488 U.S. 361, 389-96 (1989).\textsuperscript{55} Id. at 391.\textsuperscript{56} Id. at 402-04. The Constitution does not forbid judges to have two functions, provided they do not perform them simultaneously. \textit{Id.}\textsuperscript{57} Id. at 406-12.\textsuperscript{58} Id. at 412.\textsuperscript{59} See Kristin L. Timm, Note, "The Judge Would Then be the Legislature": Dismantling Separation of Powers in the Name of Sentencing Reform—Mistretta v. United States, 109 S. Ct. 647 (1989), 65 WASH. L. Rev. 249, 264 (1990) (discussing how serving on sentencing commission threatens judges' impartiality); see also Wendy E. Ackerman, Comment, Separation of Powers and Judicial Service on Presidential Commissions, 53 U. CHI. L. Rev. 930, 1004-06 (1986) (discussing application of separation of powers tests on sentencing commission).
 Critics argue that the Court's lack of discretion in applying mandatory punishment fails to provide defendants with individualized sentences guaranteed by Due Process. Courts have unilaterally rejected this challenge, rationalizing that there is still a fair measure of discretion, despite the rigid sentencing structure. Furthermore, courts have held that individualized sentencing is not guaranteed by the Constitution, except in capital cases. Courts have consistently upheld the legislatures' authority to limit judicial discretion with fixed sentences in noncapital cases. They, however, have failed to realize that although there


64 See Green, 902 F.2d at 1313 (noting Guidelines do not remove discretion from sentencing courts and "in any event the Constitution does not guarantee individualized sentencing, except in capital cases." (quoting Brittman, 872 F.2d at 828)); see also Harmelin v. Michigan, 111 S. Ct. 2680, 2702 (1991) (holding individualized sentences required in capital cases only); United States v. Frank, 682 F. Supp. 815, 823 (W.D. Pa. 1988) (holding mandatory service of judges violate separation of powers doctrine).

65 See United States v. Ortex, 902 F.2d 61, 64 (D.C. Cir. 1990) (when government does not file motion for sentencing departure under section 3553(e) of the Guidelines, courts have no authority to depart from mandatory statutory minimum sentence); United States v. Huerta, 878 F.2d 89, 93 (2d Cir. 1989) (sentencing not sole function of judiciary and legislative branch may place limits or eliminate sentencing discretion of courts), see also Mistretta v. United States, 488 U.S. 361, 364-65 (1989) (judicial discretion is matter of
is continued discretion to depart from the sentencing range, the mandatory alternatives still promote severity.66

A judge may enhance or depart from the sentencing range depending on a finding of fact made at sentencing.67 Thus, under the Guidelines, the reliability of the evidentiary basis for facts found at sentencing is of the utmost importance.68 This is especially true in drug-related cases where a defendant is convicted of possessing a certain quantity of a drug, but the prosecution at sentencing produces evidence that the offender was part of a much larger shipment.69 Critics suggest that since the judges' determinations substantially impact the adjustments made to the base offense level, they should conduct more formal hearings in order to comply with Due Process.70

D. The Application of the Eighth Amendment

Many critics question the severity of the punishments provided for in the Guidelines, in that the Guidelines fail to take into account mitigating factors.71 Defendants contend that severe prison

See Gary Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinant Sentencing Reform, 81 CAL. L. Rev. 61, 61 n.321 (1993) (discussing statutory scheme possession of cocaine with intent to distribute). Under 21 U.S.C. § 841(b)(1)(C), the term would be not less than 10 years, or more than life imprisonment. Id. However, if the offender has a prior drug conviction the sentence is increased to not less than twenty years. Id.

See United States Sentencing Commission, Federal Sentencing Guidelines Manual §§ 5K2.1 to .14, at 246-49 (1987) [hereinafter GUIDELINES MANUAL] (judges may depart from Guidelines when individual case presents facts "that have not been given adequate consideration by the commission").


See Ogletree, supra note 10, at 1949. The only offender characteristics included in the Guidelines are past criminal record and acceptance of responsibility which slightly mitigates an offender's "offense level." Id.; see also Lowenthal, supra note 66, at 113. The author questions sentencing violators on basis of weight of substance without regarding pu-
sentences are grossly disproportionate to the harm they caused to the public by their crimes.\textsuperscript{72} This is especially prevalent in drug related cases, where the sentencing mentality focuses predominantly on retribution, rather than rehabilitation.\textsuperscript{73} \textit{Terrebonne v. Butler},\textsuperscript{74} illustrates this disparity. In \textit{Terrebonne}, the court upheld a mandatory life sentence without parole.\textsuperscript{75} This sentence was imposed on a heroin addict with two prior convictions for distribution committed to support his habit.\textsuperscript{76} In cases such as these, where the defendant is a nonviolent addict, rehabilitation rather than costly incarceration for life may be a wiser use of limited resources.

The Eighth Amendment prohibits cruel and unusual punishment disproportionate to the defendant's offense.\textsuperscript{77} The Supreme Court has interpreted the Eighth Amendment as prohibiting capital punishment when it would exceed the seriousness of the offense.\textsuperscript{78} It would appear that since the Eighth Amendment prohibits the imposition of excessive fines and the punishment of death when disproportionate to the offender's crime, it should follow that

\textit{U.S. Const. amend. VIII. The Eighth Amendment provides in pertinent part: “excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.” Id.\textsuperscript{76}}

\textit{See Cabana v. Bullock, 474 U.S. 376, 386 (1986)} ( Eighth Amendment violated if death penalty imposed on defendant who did not kill); \textit{Edmund v. Florida, 456 U.S. 782, 783 (1982)} (death penalty violates Eighth Amendment when defendant does not commit or attempt murder); \textit{Coker v. Georgia, 433 U.S. 584, 585 (1977)} (plurality opinion) (holding death sentence violated Eighth Amendment for kidnapping and rape was disproportionate to crime committed).
this would likewise apply to excessive incarceration.\textsuperscript{79} However, this is not the case. The Supreme Court has frequently vacillated on this issue without fashioning a viable standard.\textsuperscript{80} This is highlighted by the disparate treatment of the defendants in \textit{Hutto v. Davis}\textsuperscript{81} and \textit{Solem v. Helm}.\textsuperscript{82} In \textit{Hutto}, the Supreme Court upheld a forty year sentence for possession of less than nine ounces of marijuana.\textsuperscript{83} On the other hand, in \textit{Solem}, a nondrug case, five Justices determined that a life sentence without parole for seven nonviolent felonies violated the Eighth Amendment.\textsuperscript{84} These decisions illustrate the disproportionate sentencing in drug related offenses. A proper standard within the Guidelines should include a mitigating factor relating to the degree of violence in connection with the crime.\textsuperscript{85} Under this proposed standard the nonviolent defendant in \textit{Hutto}, received a punishment disproportionate to the crime he committed.

Recently, in \textit{Harmelin v. Michigan},\textsuperscript{86} the Supreme Court upheld a Michigan statute which permitted a judge to impose a life sentence without parole where the defendant was in possession of more than 650 grams of illegal narcotics.\textsuperscript{87} The plurality opinion concluded that \textit{Solem} should be overruled and the sentencing

\textsuperscript{79} See Lowenthal, \textit{supra} note 66, at 114 (discussing challenges to severity of punishments).


\textsuperscript{81} 454 U.S. 370 (1982) (per curiam).

\textsuperscript{82} 463 U.S. 277 (1983).

\textsuperscript{83} See \textit{Hutto}, 454 U.S. at 370.

\textsuperscript{84} See \textit{Solem}, 463 U.S. at 279, 303 (Court overturned sentence on grounds that defendant was given sentence with no eligibility for release, except for executive pardon).

\textsuperscript{85} See \textit{Harmelin v. Michigan}, 111 S. Ct. 2680, 2713 (1991) (White, J., dissenting). Justice White would have applied a three prong test articulated in \textit{Solem} to determine whether a particular incarceration would have violated the Eighth Amendment. \textit{Id.} Under this test, the sentence would be reviewed by (1) the gravity of the defendant's offense and the severity of the punishment; (2) the sentence imposed on similar criminals in the jurisdiction; and (3) the sentences imposed in other jurisdictions. \textit{Id.}

\textsuperscript{86} 111 S. Ct. 2680 (1991).

\textsuperscript{87} \textit{Id.} at 2684; see \textit{MICH. COMP. LAWS ANN.} § 333.7403(2)(a)(i) (West Supp. 1990-91). The statute provides a mandatory sentence of life in prison for possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance." \textit{Id.; MICH. COMP. LAWS ANN.} § 333.7214(a)(xv) (West Supp. 1990-91). The statute defines cocaine as a schedule 2 controlled substance. \textit{Id.; MICH. COMP. LAWS ANN.} § 791.234(4) (West Supp. 1990-91). The statute provides eligibility for parole after 10 years in prison, except for those convicted of either first-degree murder or "a major controlled substance offense." \textit{Id.; MICH. COMP. LAWS ANN.} § 791.233b(1)(b) (West Supp. 1990-91). The statute defines "major controlled substance offense" as any violation of section 333.7403. \textit{Id.}
length should remain a legislative function. Justice Anthony M. Kennedy reasoned that drug possession created a substantial threat of violence, because drug users tended to commit other offenses. Although this may be true, a drug offender who has not endangered anyone other than himself, may be subject to life in prison because other more dangerous drug users commit the same offense. The current Guidelines impose a life sentence without contemplating mitigating factors such as rehabilitation, prior criminal history or violent disposition. The Guidelines imprison drug users, who do not threaten society, for life, when prison space could be used for more dangerous offenders.

Apparently, the drug epidemic has a profound effect on the Supreme Court's interpretation of the Constitution. After Harmelin, it appears that no member of the Court will interfere in the "offense grading" of noncapital punishment for violent crimes. Furthermore, the majority of the Court will uphold any period of incarceration, including life without parole, for all drug trafficking convictions or simple possession cases, provided the de-

88 See Harmelin, 111 S. Ct. at 2686-98. The Court offered a historical analysis of the cruel and unusual punishment clause as not including the concept of proportionality. Id. Justice Scalia opined that appellate review which includes proportionality substitutes judicial views for legislative determinations. Id.

89 See id. at 2702 (Kennedy, J., concurring in part). Justice Kennedy stated that establishing prison terms "is properly within the province of Legislators, not courts." Id. at 2703 (quoting Rummel v. Estelle, 445 U.S. 263, 275-76 (1980)). In Justice Kennedy's view, life imprisonment without parole is proportional to an offense involving a substantial amount of drug possession because drug users are likely to commit other offenses and threaten others. Id. at 2706-07. Justice Kennedy based his decision on the effects drugs have on individuals. Id. at 2706. Justice Kennedy explained: (1) drug induced changes in physiological functions, cognitive reasoning and mood which may facilitate crime; (2) drug users may commit crimes in order to pay for their drug habit; and (3) violent crime is a part of the drug business. Id.

90 See Lowenthal, supra note 66, at 116 (criticizing Justice Kennedy's contrast of Harmelin's crime with that of defendant in Solem, whose crime did not involve violence).

91 See U.S. Department of Justice: An Analysis of Non-Violent Drug Offenders with Criminal Histories, 54 Crim. L. Rep. (BNA) 2101, 2107 (Feb. 16, 1994) [hereinafter Crim. L. Rep.] (single most important determinant in offenders' sentence length is drug quantity); see also GUIDELINES MANUAL, supra note 67, at § 3B1.1 to .2 (allowing for two to four level increase or decrease in offense level depending on extent of participation).

92 See generally Lowenthal, supra note 66, at 117-18; Black, supra note 21, at 769 (interpreting Constitution in context of Federal Sentencing Guidelines). The legislature can be as harsh as it desires without crossing constitutional lines in mandating life in prison without parole for all drug traffic and simple possession convictions, provided defendant possesses a substantial amount of drugs. Id.

93 See Lowenthal, supra note 66, at 117 (discussing courts' disinclination to review laws that mandate life imprisonment without parole for offenses that directly threaten safety of others).
The defendant possessed a substantial amount. Unfortunately, this approach places all offenders in the same category, and ignores drug couriers or marginally involved offenders. Under the Guidelines, the most significant determinant in sentencing is drug quantity. The defendant's role has only minimal impact on the eventual sentence length. Therefore, it is contended that under the Guidelines, severe punishment for peripheral drug traffickers is grossly disproportionate and a waste of limited resources. The limited prison space and the cost of maintaining an individual for life should be more wisely allocated for those such as "drug kingpins" who are more directly involved in drug offenses which threaten society.

II. THE NEED FOR JUDICIAL DISCRETION

Much debate during the pre-Guidelines era focused on the problem of judicial discretion in determining sentences. Critics ar-

94 See id. at 118 n.300. The author speculates that Justice Marshall's dissent in Harmelin, replaced by newly appointed Justice Thomas will make it even less likely that the Court will disturb harsh non-capital sentences in drug cases. Id.; see also Catherine Bishop, Mandatory Sentences and Drug Cases: Is the Law Defeating its Purpose?, N.Y. Times, June 8, 1990, at B16 (examining judicial criticism of drug laws).
95 See Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion). The Court explained that statutes requiring first time offenders to be incarcerated for life regardless of extenuating circumstances treat all offenders as "members of a faceless, undifferentiated mass." Id. This applies predominately to cases in which offenders are apprehended with large amounts of drugs without the intent to distribute. Id.; see also Paul W. Valentine, Margarine Heiress Gets 14 Years for Cocaine Distribution in Maryland, Wash. Post, Mar. 9, 1990, at A18. The author noted District Court Judge Harry Hupp's description of a 14 year sentence he was required to impose on a filing clerk convicted of possession of crack cocaine and who had no prior contact with the law. Id. The filing clerk was transporting 504 grams for her brother in exchange for $250 to buy Christmas presents. Id.
96 See supra note 91 and accompanying text (discussing drug epidemic's effect on Supreme Court's interpretation of Constitution).
97 See supra note 91, at 2102 (analyzing Federal Sentencing Guidelines minimum mandatory sentences).
98 See Valentine, supra note 95, at A18 (discussing failure of increased arrests in eliminating drug problem); see also Criminal Justice Report, supra note 8, at ii. Corrections expenditures have nearly doubled to account for one-third of the total $74 billion justice expenditures. Id. Between 1984 and 1990, prison capacity increased 60%, but the number of prisoners increased 70%. Id. at 6; see also Criminal L. Rep., supra note 91, at 2102. The Bureau of Prisons estimates that it costs approximately twenty thousand dollars per year to house a federal prisoner. Id.
99 See Williams v. Oklahoma, 358 U.S. 576, 584 (1959) (holding that in discharging judge's duty to impose proper sentence, judge was authorized to consider mitigating and aggravating circumstances); Williams v. New York, 337 U.S. 241, 244 (1949) (judge's broad sentencing discretion overrode jury's life imprisonment recommendation, changing it to death sentence); United States v. Plisek, 657 F.2d 920, 923 (7th Cir. 1981) (court did not err in applying broad sentencing discretion); see also Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 916 (1962). [T]he new penology has resulted in vesting in judges . . . the greatest degree of uncontrolled power
gued that this discretion, which would take into account a defendant's personal and socioeconomic characteristics, was unfair and ineffectual. Consequently, different judicial views as to the root causes of crime led to disparity in sentencing.

The Guidelines, however, have not eliminated judicial discretion. Under the Guidelines, judges may depart from the required minimum sentence under certain circumstances. Departure from the Guidelines turns on whether the defendant has "accepted responsibility" for the criminal conduct. This departure acts as a "gap filler" for those cases which did not fall squarely within the types of situations contemplated by the drafters. The ability to reduce sentences has proven helpful in en-
couraging voluntary cooperation by criminals in testifying against others, which resulted in increasing the number of drug-related convictions.\textsuperscript{106}

However, the Guidelines’ effect on the traditional role of the judiciary in the sentencing phase continues to concern some judges.\textsuperscript{107} They view the Guidelines as an infringement on their rights to apply their experience in an effort to construct “individual sentences.”\textsuperscript{108} Judges believe this “individualized” form of punishment is more compassionate and equitable, since it is tailored to the defendant’s personal situation.\textsuperscript{109}

A. Judicial Discretion in Drug-Related Cases

The debate surrounding the role of judicial discretion is particularly prevalent in drug-related cases.\textsuperscript{110} The major issue is

\textsuperscript{106} See United States v. Anders, 899 F.2d 570, 580 (6th Cir. 1990) (downward departure may be appropriate where conduct significantly differs from norm); United States v. Rogers, 972 F.2d 489, 495 (2d Cir. 1992) (vacated and remanded district court’s decision denying defendant’s request for downward departure based on extraordinary acceptance of responsibility as indicated by surrendering confession); cf. United States v. Poston, 902 F.2d 90, 99 (D.C. Cir. 1990) (government not compelled to request reduction even though police officer promised cooperation would be rewarded); United States v. Jetter, No. 3-93-213, 1994 WL 17530, at *3 (D. Conn. 1994) (repeat offender confessed and identified photos of other participants).

\textsuperscript{107} See Jack B. Weinstein, No More Drug Cases, N.Y. L.J., Apr. 15, 1993, at 2. Judge Weinstein stated:

On one day last week, I had to sentence a . . . West African woman to 46 months in a drug case. The result of her young children will undoubtedly be . . . devastating . . . These . . . cases confirm my sense of depression about much of the cruelty I have been a party to in connection with the “war on drugs” . . . I simply cannot sentence another impoverished person whose destruction has no discernable effect on the drug trade. I wish I were in a position . . . to propose some solution . . . but I am not.

\textit{Id.}

\textsuperscript{108} See United States v. Andruska, 964 F.2d 640, 646-47 (7th Cir. 1992) (Will, J., concurring) (serious defects and injustices in Guidelines sentencing process has been noted by number of courts); United States v. Mobley 956 F.2d 450, 461 (3d Cir. 1992) (noting commentators have remarked that Guidelines inflexibility in calculating sentencing ranges, has effected shift from judicial to prosecutorial discretion); United States v. Harrington, 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., concurring). “As we have come to learn, the Guidelines are rigid in formulation and, thus, often produce harsh results that are patently unfair because they fail to take account of individual circumstances that might militate in favor of a properly ‘tailored’ sentence.” \textit{Id.}

\textsuperscript{109} See United States v. Brittman, 872 F.2d 827, 828 (8th Cir. 1988) (discussing individualization of sentences), \textit{cert. denied}, 493 U.S. 865 (1989). \textit{See generally} Rebello, supra note 70, at 1053-54. While defendants have no right to individualized sentencing, some courts have criticized the Guidelines for their failure to fully address differences among offenders. \textit{Id.}

\textsuperscript{110} See United States v. Davern, 970 F.2d 1490, 1490 (6th Cir. 1992) (discussing judicial discretion in sentencing process); United States v. LaGuardia, 902 F.2d 1010, 1013 (1st Cir. 1990). “It is by now apodictic that the sentencing guidelines effectively stunt the wide discretion which district judges formerly enjoyed in criminal sentencing.” \textit{Id.;} United States v. Seluk, 873 F.2d 15, 17 (1st Cir. 1989). “We accept appellants contention that the guidelines
whether judges are allowed to reduce an offender's sentence when it is shown they have successfully undertaken "rehabilitative" efforts such as voluntarily terminating drug use and enrolling in a rehabilitation program.\textsuperscript{111} Courts have refused to diminish sentences, despite evidence of rehabilitation, based on four major grounds.\textsuperscript{112} First, these courts believe that the Sentencing Commission adequately considered rehabilitation when they formulated the Guidelines.\textsuperscript{113} Rehabilitation is currently viewed as "postoffense" conduct which is not taken into account in determining a sentence, unlike "acceptance of responsibility" for which downward departure would be allowed.\textsuperscript{114} Second, these courts argue that the Commission adequately considered rehabilitation in the Guidelines' proscription against downward departure based on a defendant's drug dependency at the time the crime was committed.\textsuperscript{115} Some courts have stated that this explicit rejection of dependency, as a grounds for departure; must include a rejection of rehabilitation, since an offender cannot become rehabilitated unless he is an addict.\textsuperscript{116} Third, some courts reason that factoring in curtail the sentencing judge's discretion." \textit{Id.}; United States v. Bogle, 689 F. Supp. 1121, 1135-36 (S.D. Fla. 1988) (overview of judicial discretion debate).

\textsuperscript{111} See Seymour, \textit{supra} note 102, at 837 (examining whether rehabilitation should be used as factor for downward departure of sentences imposed by Guidelines). The author suggests rehabilitation efforts should be included within the "acceptance of responsibility" adjustment provided in the Guidelines. \textit{Id.} at 840; \textit{see also} GUIDELINES MANUAL, \textit{supra} note 67, at § 3E1.1 (allowing two level reduction in offense level for affirmative acceptance of personal responsibility).

\textsuperscript{112} See Seymour, \textit{supra} note 102, at 841 (court reasoned that allowing departure would subvert purpose of Guidelines).

\textsuperscript{113} \textit{Id.} If judges reconsider rehabilitation as a factor, it would violate the spirit of the Act. \textit{Id.}

\textsuperscript{114} \textit{Id.} at 844. (discussing courts' reluctance to use rehabilitation as a means for departing from Guidelines); \textit{see also} United States v. Pharr, 916 F.2d 129, 130 (3d Cir. 1990) (drug rehabilitation found inconsistent with underlying nature of factors included in Guidelines); United States v. Braxton, 903 F.2d 292, 292 (4th Cir. 1990) (reversing lower courts decision that rehabilitation was necessary element of acceptance of responsibility), rev'd on other grounds, 500 U.S 344 (1991).

\textsuperscript{115} See Seymour, \textit{supra} note 102, at 845. Courts rejected rehabilitation as grounds for departure based on the speculative assessment of section 3E1.1 of the Guidelines. \textit{Id.}; \textit{see also} David I. Shapiro, Note, \textit{Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation}, 91 COLUM. L. REV. 2051, 2061 (1991). Although the Guidelines do not speak directly to the issue of drug rehabilitation, the Guidelines provide that "[d]rug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines." \textit{Id.} (quoting GUIDELINES MANUAL, \textit{supra} note 67, at § 5H1.4).

\textsuperscript{116} See United States v. Harrington, 947 F.2d 956, 970 (D.C. Cir. 1991) (Silberman, J., dissenting) (drug dependency is not reason for imposing sentence below Guidelines); United States v. Martin, 938 F.2d 162, 163 (9th Cir. 1990) (rehabilitation not grounds for departure since already taken into account by commission when formulating Guidelines); United States v. Pharr, 916 F.2d 129, 133 (3d Cir. 1990) (same).
rehabilitation would violate the spirit of the SRA since the Guidelines were designed to shift from rehabilitation toward a more deterrence based system of punishment. Therefore, to allow rehabilitation to affect sentencing would be inconsistent. Finally, courts argue that such an approach would provide special treatment in the form of lighter sentences to the drug addict, over the nonaddicted user who did not need rehabilitation.

Proponents of judicial discretion, particularly in drug-related cases, denote the Guidelines' failure to effectively fight the "War on Drugs." These judges believe a more compassionate approach should be taken with the "small time" user. Judge Jack Weinstein of the United States District Court for the Eastern District of New York, along with Judge Whitman Knapp of the Southern District of New York, in protest to the harshness of the Guidelines, refuse to preside over drug related cases.

117 See, e.g., Braxton, 903 F.2d at 296 (court concluded that district court "misperceived the purpose of the Guideline [§ 3E1.1] by interjecting into calculus need for rehabilitation"); United States v. Harris, 882 F.2d 902, 905 (4th Cir. 1989) (acknowledgement of wrongdoing does not constitute acceptance of responsibility); United States v. Urrego-Linnores, 879 F.2d 1234, 1239 (4th Cir. 1989) (voluntary cooperation after conviction not acceptance of responsibility), cert. denied, 493 U.S. 943 (1989); United States v. White, 875 F.2d 427, 430 (4th Cir. 1989) (defendant not entitled reduction because pleading guilty not acceptance of responsibility).

118 See Pharr, 916 F.2d at 133. See generally Seymour, supra note 102, at 851-52 (courts argue departure for rehabilitated defendants is unfair since nonaddicted offenders have no chance for reduction); Shapiro, supra note 115, at 2069 (rehabilitation should not be rewarded since it would be tantamount to rewarding addict for being addicted).


The author noted:

There is a widespread and pervasive feeling that no one is listening in Washington, and that urgent demands for Guideline reforms are simply being ignored. Those who created the Guidelines are so wedded to their tenacious defense that they remain oblivious to the systemic dissonance they have created. The Federal Sentencing Commission, and the Congress which created it, simply are not getting the message, although the message could not be clearer: Your cure is worse than the disease.

Id.

120 See Fischler, supra note 10 at 2 (concurring with Judge Wittman Knapp's policy to boycott drug cases, citing inability to fashion individual sentences for small time users); Marquez, supra note 6, at A10. Some court's have ruled that sentencing requirements for career offenders is unconstitutional. Id. Judge Green sentenced drug offenders to ten years rather than require a thirty year sentence. Id.

From a statistical point of view, it is clear that the Guidelines have failed to control the growth of drug offenses. An increase, rather than a decrease, in drug offenses lend merit to the arguments put forth by proponents of judicial discretion. In contrast to the Guidelines, a growing number of commentators reason that rehabilitation would be a more sensible approach to the "small scale" user. Rehabilitation would relieve prison overcrowding, reduce the number of repeat offenders, and allow the majority of efforts to center around the conviction of the "larger scale" dealers. Allowing judges greater discretion to choose rehabilitation for a small time addict, while reserving harsher penalties for violent large scale offenders, may represent a more efficient approach towards fighting the "War on Drugs."

III. THE PROBLEM OF SENTENCING DISPARITY

The Sentencing Guidelines were also an attempt to eliminate disparity in sentences for similarly situated offenders. The Commission believed that judges relied too much on a defendant's personal situation, rather than the harm caused. As a result, defendants convicted of the same offense were given different sentences depending on the judge presiding over the case. Not only have the Guidelines not eliminated the disparity, but the Guidelines have damaged the integrity and fairness of the crimi-

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122 See Criminal Justice Report, supra note 8, at 7 (discussing drug offenders increase in prison population).
123 See Tackett, supra note 9, at 6. The author stated: The result has been a record number of arrests and prison terms. The government reported . . . that the prison population of the state and federal prisons rose 42,862 in the first half of 1990 to a record 755,425 inmates. Drug crimes fueled the increase. Id.
124 See Marquez, supra note 6, at A10 (advocating work release and random drug testing for small-time users).
125 Id.
127 See Berlin, supra note 3, at 193. The author discussed the pre-Guidelines approach to sentencing, whereby judges often took into account such factors as defendant's age, education, vocational skills, mental condition, family ties, and previous employment record when determining an appropriate sentence. Id. at 193 n.38.
128 See S. REP NO. 225, 98th Cong., 1st Sess. 52, 56, 159-61 (1983) (sentences for identical crimes varied widely). In this study, fifty judges, after being given the same presentence report, imposed varying sentences. Id. at 3224 n.22. For example, bank robbery sentences ranged from ten years imprisonment to five years probation. Id. at 3225-26.
nal justice system. Reverting back to a guided "judicial discretion" approach, while not completely eliminating the disparity, may be a more effective solution for drug related cases.

A. The Prosecutor’s Ability to Affect Sentencing

A common observation with respect to the Guidelines is that rather than eliminating disparity, the Guidelines merely shift the power to affect sentencing from the judge to the prosecution. This is unfair due to a prosecutor’s partiality toward achieving a maximum sentence, as compared to the judge’s impartial role. Placing this power within the prosecutor’s purview, while simultaneously restricting judicial discretion, has led to some very questionable results, particularly in cases that involve drugs such as LSD.

LSD is a liquid commonly placed on other substances such as blotter paper, sugar cubes, or gelatin tablets. This is done before sale so as to make ingestion easier. In Chapman v. United States, the Supreme Court highlighted the manner in which this process leads to possible sentence manipulation. The defendant possessed 50 milligrams of pure LSD, however, the Court held that the total weight of the drugs in addition to the blotter on which it was placed, must be used to determine the sentence.

129 See Knapp, supra note 1, at 61. The enactment of the Guidelines and its rigid sentencing requirements in drug-related cases have devastated the criminal justice system. Id. The author stated he was “convinced that [the Guidelines’] enactment arose out of legislative frustration . . . I can also tell you that they daily require the imposition of sentences which are horribly unjust.” Id.

130 See United States v. Dockery, 965 F.2d 1112, 1115 (D.C. Cir. 1992) (enlargement of prosecutors’ role does not warp criminal justice system); United States v. Santos, 932 F.2d 244, 255 (3d Cir.) (expansion of prosecutors role does not violate Due Process), cert. denied, 112 S. Ct. 529 (1991); United States v. Mills, 925 F.2d 455, 464 (D.C. Cir. 1991) (the court held that the Sentencing Reform Act and the Guidelines did not violate Due Process by shifting influence over sentencing from the judiciary to the prosecutor), cert. denied, 113 S. Ct. 471 (1992); see also United States v. Huerta, 878 F.2d 89, 93 (2d Cir. 1989) (sentencing not solely judicial function), cert. denied, 493 U.S. 1046 (1990); Uelmen, supra note 119, at 900. “The Federal Sentencing Guidelines, quite simply, take that task away from judges and turn it over to prosecutors. Prosecutors, I would contend, are ill-equipped to perform the ultimate function of apportioning justice among the plethora of defendants who play varying roles in the typical criminal enterprises prosecuted in federal courts today.” Id.


132 See infra notes 133-137 and accompanying text (discussing broad discretion given to prosecutors).


134 Id. at 1922.
under the Guidelines. This increased the weight to 5.7 grams, and lead to a harsher sentence. This ruling provides prosecutors with more power in their "sting" operations, since they now could obtain harsher convictions by placing the LSD on heavier substances such as sugar cubes, rather than a lighter substance like blotter paper. Consequently, sentences for otherwise similar offenses may be grossly disproportionate, even though the amount of actual LSD in each case is identical.

This illustration demonstrates that the Guidelines not only failed to eliminate sentencing disparity, but actually increased it in certain situations. This disparity violates the purpose of the Guidelines and public policy as well. Since it has been shown that disparity cannot be totally eliminated, it may be more sensible to focus on a defendant's personal characteristics and degree of violence in determining the sentence.

135 Id. "We hold that it is the weight of the blotter paper containing the LSD, and not the weight of the pure LSD, which determines eligibility for the minimum sentence." Id.

136 Id. at 1922. The Guidelines impose a mandatory minimum sentence of 5 years for possession of 1 gram of pure LSD. Id. The defendant was sentenced to 96 months in prison, even though "the [actual pure] LSD by itself weighed only about 50 milligrams, not even close to the one gram necessary to trigger the 5-year mandatory minimum of § 841(b)(1)(B)(v)." Id.

137 See Berlin, supra note 3, at 213 (these types of disparate results provide incentive for manipulation of investigations and sting operations by prosecutors, defying congressional goal of eliminating sentencing disparity).

138 See United States v. Chapman, 111 S. Ct. 1919, 1924 (1991). Dealers selling 100 doses could receive the following disparate sentences:

<table>
<thead>
<tr>
<th>Carrier</th>
<th>Weight</th>
<th>Level</th>
<th>Guideline Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sugar Cube</td>
<td>227 gr.</td>
<td>36</td>
<td>188-235 (mos)</td>
</tr>
<tr>
<td>Blotter Paper</td>
<td>1.4 gr.</td>
<td>26</td>
<td>63-78 (mos)</td>
</tr>
<tr>
<td>Gelatin Capsule</td>
<td>225 mg.</td>
<td>18</td>
<td>27-33 (mos)</td>
</tr>
<tr>
<td>Pure LSD</td>
<td>5 mg.</td>
<td>12</td>
<td>10-16 (mos)</td>
</tr>
</tbody>
</table>


139 See Theresa W. Karle & Thomas Sager, Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis, 40 Emory L.J. 393, 429-34 (1991). There are three ways in which disparity continues: (1) overbroad categories result in similar sentences for unlike offenders; (2) exclusion of facts or charges per plea agreements significantly alters sentencing decisions; and (3) excessive or inappropriate judicial departure from Guidelines. Id.


We are paying a high price for the present sentencing system, and not only in dollars. It is a high price in terms of the integrity of the criminal justice process, in terms of human life and the moral capital of the system. The elimination of unwarranted disparities is a worthy objective but it has not been achieved. Instead a system conducive to producing arbitrary results has been created.

Id.
IV. Proposed Alternatives

Many hoped that stricter sentences would represent a “quick fix” for this national tragedy. Unfortunately, statistics show the present strategy has failed. Various proposals have been put forth in an attempt to restore fairness and integrity to the sentencing system.

A. Guided Discretion: Offenders’ Characteristics

One proposed reform would allow a judge the discretion to take into account an offender’s characteristics. This reform would allow judges to consider mitigating factors such as poverty, which tends to explain an offender’s criminal culpability. Proponents of this approach argue that the Guidelines should allow for a number of “grade levels” for which these factors could reduce a defendant’s sentence. It is believed this could cure the Guidelines’ indifference toward socioeconomic conditions and their relations to drug use. This reform would represent a compassionate approach towards individualized sentencing which would be con-

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141 See supra notes 1-20 and accompanying text (discussing shift from rehabilitation towards stricter mandatory sentences); see also Knapp, supra note 1, at 61. The Guidelines arose out of the legislature’s frustration with the nation’s drug problem, and its past failures to effectively combat the epidemic. Id.

142 See Meisler, supra note 9, at 20, 24. The 1980s decline in the street price of drugs indicated that increased law enforcement did not hurt the drug trade. Id. A Rand Corporation report concluded that intensified law enforcement efforts, along with harsher prison sentences, have actually raised the violence in the drug trade because now dealers must resist to avoid incarceration. Id. at 20.

143 See Ogletree, supra note 10, at 1956 (discussing proposals to reform); see also KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 58-59 (1977) (advocating importance of discretion to supplement Guidelines).

144 See Ogletree, supra note 10, at 1956. The author emphasized the importance of using “guided discretion,” and advocated that the Commission review the Supreme Court’s death penalty jurisprudence as a model. Id.

145 Id. at 1957. The author stated:

A guided discretion model would be easy to incorporate into the sentencing guidelines. The guidelines could direct judges to consider as potentially mitigating factors . . . poverty, educational deprivation, and family instability—that tend to diminish our sense of an individual law-breaker’s culpability.

146 Id. Such an approach would allow the sentence to consider the individual’s characteristics relevant to mitigating the severity of their punishment.

147 See Donald P. Lay, Rethinking the Guidelines: A Call for Cooperation, 101 YALE L.J. 1755, 1765-66 (1992). The author discussed the pros and cons of proposed amendments which would allow departure from the Guidelines in certain situations. Id. These amendments would take into consideration the offenders’ characteristics, and give the judge more flexibility to impose a sentence other than imprisonment. Id.
sistent with Due Process. Therefore, by restoring "guided judicial discretion," a more equitable and reliable system of punishment would be created.

B. The Use of Sentencing Panels

An alternative solution is the formation of sentencing panels. Under this proposal, the Guidelines would be set aside, and the Sentencing Commission would study "normal cases" and fashion an appropriate sentence. This sentence would then act as a precedent for which a rotating three-judge panel could rely on as a starting point for deliberation. The panel would meet weekly or monthly to sentence cases which accumulated over that time. Judges would then confer and the majority decision would determine the sentence. All these sentences would require a statement of reason, and would include dissenting opinions. The panel would be obligated to either adhere to the commission's precedent or distinguish the case. It is believed this would foster communication between judges, the commission, and the courts, thereby promoting fairness and uniformity in the sentencing process.

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148 See Ogletree, supra note 10, at 1956 (predetermined sentencing procedures overlook "the possibility of compassionate or mitigating factors stemming from the diverse frailties of human kind" (quoting Woodson v. North Carolina, 428 U.S. 280 (1976))).

149 See generally Koh, supra note 101, at 1127 (proposing sentencing panels to inform and monitor discretion).

150 Id. These cases would involve disadvantaged men and women who engage in small scale drug dealing for easy money, therefore structuring an appropriate sentence for that class. Id.

151 See Alschuler, supra note 138, at 916-17. A proposed alternative by Professor Alschuler would authorize the Commission to draft a type of administrative precedent for certain recurring cases. Id.

152 See Koh, supra note 101, at 1127-28 (discussing benefits derived from such panels, such as increased communication among judges); see also Peter A. Ozanne, Judicial Review: A Case for Sentencing Guidelines and Just Desserts, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 180-85 (Martin L. Forst ed., 1982).

153 See Koh, supra note 101, at 1127. During these meetings the panel of judges would benefit from the probation officer's testimony. Id. Along with this testimony, the judges could examine defendant's demeanor and testimony in fashioning an appropriate sentence. Id.

154 Id. at 1128. Professor Koh believes this would advance our understanding of sentencing and promote communication between judges.

155 Id. Professor Koh compares this proposal to the sentencing councils established during the 1960s in the federal district courts of Detroit, New York, and Chicago. Id. However, this proposal would require more formality, with the panels decision binding upon the trial judge. Id.

156 Id.

157 Id. This fairness and uniformity in sentencing proposed by Professor Koh would cure a basic deficiency in the current Guidelines. Id.
C. Defendants Who Overcome Their Drug Addiction Prior to Sentencing

This proposal recognizes the Guidelines' failure to incorporate an offender's attempt at drug treatment prior to sentencing as a mitigating factor. It has been proposed that courts faced with an addict who overcomes his dependency should incorporate this factor in sentencing in one of three ways. Courts could select a sentence from the bottom of the Guideline range; grant a two-level sentence reduction; or depart from the Guidelines. De-

158 See Koh, supra note 101, at 1130. Although geographic disparity may be created, this disparity may not violate public policy because "[u]ntil society reaches a consensus on sentencing purposes, it cannot be said whether certain types of disparities, such as those between districts, should be deemed 'unwarranted.'" Id.
159 Id. at 1130. Proponents put forth an argument that the deterrence of illegal alien smuggling may require a harsh sentence in states such as Texas, but the same sentence would have little deterrent effect in a state such as Massachusetts. Id.
160 See Koh, supra note 101, at 1130 (author estimates new proposal would require three times amount of judicial time); see also LESLIE T. WILKINS ET AL., SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION 2-3 (1978) (noting overburdened federal courts do not need time-consuming sentencing process).
161 See Winters, supra note 9, at 1200 (currently Guidelines do not expressly incorporate success in drug treatment in sentencing formula).
162 See id. at 1200 (discussing amending Federal Sentencing Guidelines to provide for offender's likelihood of success in drug treatment).
163 See United States v. Lara-Velasquez, 919 F.2d 946, 956 (5th Cir. 1990). "[T]he Guidelines do not preclude consideration of a defendant's rehabilitative potential as a mitigating factor within an applicable range of punishment." Id.; see also Winters, supra note 9, at 1221 (such proposal may not provide necessary amount of incentive for all defendants to seek treatment).
164 See United States v. Van Dyke, 895 F.2d 984, 985 (4th Cir.) (if rehabilitation is mitigating factor, then two level reduction appropriate), cert. denied, 498 U.S. 838 (1990); United States v. Williams, 891 F.2d 962, 966 (1st Cir. 1989) (defendant granted two level reduction due to acceptance of responsibility for two prior convictions); see also Winters, supra note 9, at 1222. Author proposes new Guideline section which would state that, if the drug addict succeeds in overcoming his drug addiction or successfully participates in a drug treatment program, he will have a three level reduction in the offense level. Id.
parture from the Guidelines would provide greater incentive for the addict to seek drug treatment.

D. Guideline Departure for Low-Level Drug Law Violators

Another proposal would allow departure from the Guidelines for the low-level drug violator. This proposition encompasses society's current retributivist attitude towards drugs offenders. This approach recognizes that not only are most low-level drug offenders non-violent, but shorter prison sentences have the same deterrent effect as the Guidelines' minimum mandatory sentences.166

Low-level drug law violators are non-violent offenders with minimal or no prior criminal history, whose offense does not include complex criminal activity.167 Studies by the Bureau of Prisons ("BOP") have indicated that low-level offenders constitute 36.1 percent of all drug law offenders, and 21.2 percent of the total sentenced federal prison population.168 Furthermore, the average sentence of the low-level offender group amounts to a minimum of 81.5 months, which means individuals will serve 5.75 years before they are released from prison.169 However, recent studies have shown that the recidivism rate for low-level drug offenders is 19.1 percent, as compared to 40.7 percent for drug offenders as a whole.170 These statistics demonstrate that harsher prison


166 See Crim L. Rep., supra note 91, at 2101. A study prepared by the Office of the Deputy Attorney General, with the assistance of the Federal Bureau of Prisons, indicates that the amount of prison time has little effect on whether the low-level drug offender will become a repeat offender. Id. In addition, the study states that increased sentences consume valuable prison space which could be used more efficiently. Id. at 2102.

167 Id. at 2108. The study classified low level drug violators as non-violent offenders with minimal or no prior criminal history, whose offense did not involve sophisticated criminal activity, and who otherwise did not present negative characteristics which would prohibit consideration for sentence modification. Id.

168 Id. at 2101. Classification assumes offenders have no prior violent criminal history. Id. When the prison population that participated in the study was restricted to those with zero criminal points, low level drug violators constituted 28.2 percent of all offenders and 16.6 percent of all sentenced prisoners. Id.

169 See id. at 2101 (two-thirds of drug offenders in Bureau of Prisons received mandatory minimum sentences). Among low level drug offenders, sentences have increased 150 percent above what they were prior to the enactment of the Guidelines. Id.

170 Id. at 2116; see Miles D. Harer, Recidivism Among Federal Prison Releasees in 1987, in FEDERAL BUREAU OF PRISONS, WASHINGTON, D.C. (1993) (providing that lower criminal history category defendants less likely to recidivate, than higher risk defendants).
sentences for low-level drug offenders is unnecessary and costly. The BOP's research over the last forty three years examining recidivism predictors indicate that time served in prison has never been found to decrease or increase the likelihood of recidivating. Therefore, decreasing low-level offenders sentences will not only promote criminal justice policy goals, but also increase prison space and re-allocate limited resources towards more violent high-level drug offenders.

CONCLUSION

The national drug tragedy remains a serious problem. Since these drug offenses constitute serious crimes, consideration of criminal justice policy goals become increasingly complex. The retributive goal focuses on mandatory minimum sentences and longer guideline sentences as a means of combating this drug problem. The rehabilitation approach favors less severe sentences with a focus towards reducing recidivism. The Guidelines' pure retributive reaction towards this national tragedy is an ineffective and inefficient use of limited government resources.

While not advocating one criminal justice policy over another, it cannot be denied that an incorporation of the two goals presents a more reasonable alternative. The proposals outlined in this paper reflect such an alternative. These proposals may design a federal criminal justice policy that will achieve the same, if not better, results while not posing an excessive economic burden on taxpayer.

Matthew Campese & Patrick J. Dussol

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171 See Crim. L. Rep., supra note 91, at 2117. A study of predictors such as time served, age, education, prior arrests, work experience and drug and alcohol dependency have never been found to change the likelihood of recidivating. Id.; see also Alan J. Beck & Bernard E. Shipley, "Recidivism of Prisoner's Released in 1983", in BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT DEPARTMENT OF JUSTICE 1 (1989) (examining rearrests and reconviction among prisoners in eleven states released in 1983).